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Supreme Court of the United States

October Term, 1943.

No. [redacted] 5

STATE OF NEW YORK and SARATOGA SPRINGS COMMISSION and SARATOGA SPRINGS AUTHORITY,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Attorney for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners above named represented by Nathaniel L. Goldstein, Attorney General of the State of New York, respectfully pray that a writ of certiorari be issued from the Supreme Court of the United States directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 124, October Term, 1943, United States of America, plaintiff-appellee, v. State of New York and Saratoga Springs Commission and Saratoga Springs Authority, defendants-appellants, and that the judgment of the Circuit Court of Appeals and the judg-

ment of the District Court may be reversed, and that the petitioners may have such other and further relief as may be just and proper.

Statement of the Case.

This suit was brought by the United States in its District Court for the Northern District of New York against the State and its agencies for collection of tax in excess of $3,000 imposed by the United States upon sales of bottled mineral water by the State and its agencies. The State has defended upon the ground that it is selling a natural resource which it owns, incidentally to a larger program related to the health and welfare of its citizens, which has long been a matter of State concern, and that such sales are constitutionally immune from taxation.

The complaint (R. 3-8) was met by answers (R. 9-15) and the facts were stipulated (R. 15-32).

The decision of the District Court was for the plaintiff (R. 32-39), and judgment was entered against the defendants (R. 41-44). Upon appeals by the defendants (R. 44-47) the Circuit Court of Appeals affirmed.

Opinions Below.

The opinion of the District Court (R. 32-39) is reported in 48 F. Supp. 15. The opinion of the Circuit Court of Appeals, dated February 7, 1944, is reported in 140 F. (2d) 608.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 23, 1944. The jurisdiction of the Supreme Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28 § 347).

Statutes Involved.

The federal act directly involved is the Revenue Act of 1932, section 615 (a) (5), which is as follows:

> "There is hereby imposed * * * (5) upon all natural or artificial mineral waters or table waters, whether carbonated or not, and all imitations thereof, sold by the producer, bottler or importer thereof, in bottles or other closed containers, at over 12½ cents per gallon, a tax of 2 cents per gallon." (47 Stat. 265.)

Paragraph 26 of the Stipulation of Facts (R. 31-32) lists several New York statutes relative to the Saratoga Springs reservation, of various years commencing with 1909. The following excerpts from Ch. 866 of N. Y. Laws of 1930 will serve as an illustration of their general purport:

> "A temporary state commission, to be known as the Saratoga Springs commission, is hereby created * * * for the purpose of ultimately developing the Saratoga Springs reservation as a state health resort and spa for use by the public for balneological, therapeutic and other similar healthful purposes. The development of such reservation for public health purposes is hereby declared a policy of the state * * *.
>
> "The commission shall have the power and it shall be its duty, subject to the provisions of this act, to conserve, maintain, control and develop each and every part of the reservation property. * * * The commission may prescribe the terms upon which any excess of mineral water and gas not used on said reservation or used under said leases or concessions, shall be sold or distributed, and shall prescribe the names, labels and advertisements to be affixed to the bottles or other vessels containing such waters, gases or other products, and may itself sell or dispose of the same. * * * The commission may make or cause to be made scientific studies and experiments concerning kinds of illnesses and diseases which lend themselves to the treatment of the mineral waters, products and facilities of the reservation, and shall exercise exclusive control and supervision over the manner and method or the use of the products and facilities of the reservation.

"The commission is hereby authorized and empowered to maintain and conduct the bath houses now on said reservation and such other bath houses as the commission may from time to time cause to be erected; to maintain and conduct the drink-hall or halls on said reservation and such others as may be built under the supervision of the commission; and also to maintain and conduct the bottling plant now on said reservation and is further authorized and empowered to enlarge or rebuild the same or construct a new and more adequate one as, in its discretion, will be most advantageous.

"The commission shall deposit at least once in each week in the depository or depositories designated by the [state] comptroller all moneys received by it for all purposes."

Summary Statement of Matter Involved.

The stipulation which occupies about seventeen pages of the record (R. 15-32) is the best source, and the following is merely a general outline, with a few of the facts most immediately relevant.

Commencing in 1911, when the ancient springs had become greatly impaired under private operation, the State undertook the purpose of preserving and restoring them and making them of greatest usefulness (R. 20). It has expended nearly $9,000,000 for lands and improvements, of which $3,200,000 was borrowed by the Authority from the RFC, and has appropriated various other sums for current expenses and interest payments. The total annual operating receipts of the Commission and Authority have never been sufficient to meet annual expenses, even after excluding interest and amortization charges on the RFC loan (R. 30).

Of the numerous related activities which make up that aggregate deficit, the one producing the greatest net in-

come is the lease of the Gideon Putnam Hotel Sanitarium, and the two largest items of gross income, excepting appropriations by the Legislature, are from admissions to the bath houses and sales of the bottled waters (R. 31).

The gross receipts from sales of bottled waters averaged about $125,000 annually from 1932 to 1941 (R. 23), from which certain expenses including advertising (R. 24) were deducted, but not depreciation or other capital expenses, resulting in a profit which averaged slightly over $16,000 annually in those years (R. 27-28).

The consistent policy of the Commission and the Authority has been to increase the volume of waters bottled and sold and derive the largest profit possible from this activity, in order that the proceeds might be applied to the cost of other services rendered at the Spa (R. 26-27). The "profit" averaging over $16,000 annually, mentioned above, was thus applied (R. 28).

Three mineral waters and one plain water are bottled and sold, and were during the period covered by the assessments, all in their natural state. The mineral waters are Hathorn, a laxative water; Coesa, a diuretic water; and Geyser, a digestive water. These are properly classified as mineral waters; they are not suitable for indiscriminate beverage use and cannot be mixed with fruit juices or alcoholic beverages. The plain water, known as State Seal, is a high chemical and vegetable purity. It is used very largely in various state institutions and offices, and a small amount is also purchased by the general public, mostly on recommendation of physicians (R. 22). About 50% of the total waters upon which the tax was levied were handled by one distributor in New York City and vicinity, but smaller amounts were sold elsewhere in New York State and in other states (R. 23-34).

Question Presented.

Does the taxing power of the United States extend to moneys in the hands of a State received by it from sales of a natural resource which it owns, such sales being made incidentally to a larger program related to the health and welfare of its citizens which has long been a matter of concern to the State?

Reasons Relied on for Allowance of the Writ.

A.

The Courts below have decided the foregoing question in the affirmative. Their opinions indicate that they are presently without any guide as to how much, if any, of the state immunity from federal taxation declared in *Collector* v. *Day*, 11 Wall. 113 (1870), and cases following it, remains since the personal income tax aspect of that decision was disapproved in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466 (1939).

B.

It is the contention of the petitioners that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, decided by the Supreme Court. The Circuit Court of Appeals in the final paragraph of its opinion asserted the present rule to be that "any lawful function" of the United States is constitutionally immune from state taxation, but "*only a limited class of state activities*" (those necessary "*to protect the continued existence of a state*," according to an earlier paragraph) are similarly immune from federal taxation. It is submitted that this test for state immunity is valueless, inasmuch as there is no minimum standard of what constitutes the "continued existence of a state";

moreover, this test is not authorized by the decisions of the Supreme Court.

C.

It is further contended that the Circuit Court of Appeals has decided a federal question in a way probably in conflict with decisions of the Supreme Court, insofar as there is involved the validity of a federal tax imposed upon sale by a state of natural resources owned by it. The case of *Helvering* v. *Producers Corp.*, 303 U. S. 376 (1938), and the earlier cases of taxation of proceeds from oil leases cited therein, all assume that such proceeds when derived by a state and in its hands are immune from federal taxation.

BRIEF SUPPORTING PETITION.

The following argument is offered in expansion of the three grounds previously stated.

The source of all discussion upon the reciprocal tax immunities inferred from the dual sovereignties of the federal Constitution is the opinion of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), holding that a bank chartered by the United States was immune from a Maryland stamp tax imposed on the bank's circulating currency, and Mr. Justice Nelson's opinion in *Collector* v. *Day*, 11 Wall. 113 (1870), holding the salary of a Massachusetts judge immune from a federal income tax. In the latter case the basis of the inferred immunities was stated as follows:

> "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that govern-

ment. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" (11 Wall. p. 127.)

Within the past ten years there has been great increase of authorities, stemming from those cases and that doctrine. The reasons for this phenomenon are prudently left for historians to determine and declare—it is a sufficient evil for the present day to note the numbers of authorities and their inconsistencies of formula and result.

The courts in eight cases prior to 1939 invalidated the following taxes:

(1) A federal stamp tax on bonds required by state law from licensed liquor dealers. *Ambrosini* v. *United States*, 187 U. S. 1 (1902).

(2) A federal tax upon the income of an employee of a municipally-operated street railway. *Frey* v. *Woodworth*, 2 F. 2d 725 (D. C. Mich., 1924), error dis. 270 U. S. 669 (1926).

(3) A federal sales tax on a motorcycle sold to a municipality for its police department. *Indian Motocycle Co.* v. *United States*, 283 U. S. 570 (1930).

(4) A federal tax upon income of a lessee derived from oil produced from school lands held in trust by the state and leased by it. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393 (1931).

(5) A federal tax upon the salary of a superintendent of public parks. *Commissioner* v. *Sherman*, 69 F. 2d 755 (C. C. A., 1st, 1934).

(6) A federal tax upon the salary of a superintendent of a public school cafeteria. *Hoskins* v. *Commissioner*, 84 F. 2d 627 (C. C. A., 5th, 1936).

(7) A federal tax upon the income of an employee of a municipal water supply bureau. *Brush* v. *Commissioner*, 300 U. S. 352 (1937).

(8) A federal tax upon the salary of a member of a state commission engaged in constructing and operating a bridge. *Bower* v. *Glenn*, 21 F. Supp. 766 (D. C., Ky., 1938), ap. dis. 107 F. 2d 1013 (1938).

Meanwhile, in eleven other cases, the courts have sustained the following taxes:

(1) A federal license tax upon state-owned liquor dispensaries. *South Carolina* v. *United States*, 199 U. S. 437 (1905).

(2) A federal excise tax upon private corporations organized under state laws. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1910).

(3) A federal tax upon compensation paid by a state to engineers engaged in supervising construction of a municipal water supply and sewage disposal system. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1925).

(4) A federal income tax on capital gains derived from sales of municipal bonds. *Willcuts* v. *Bunn*, 282 U. S. 216 (1930).

(5) A federal tax upon the lessee's income derived from resale of oil produced by state lands, under a lease which effected a present sale of the oil in the ground to the lessee. *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279 (1930).

(6) A federal tax upon the lessee's income from oil lands leased by a municipality. *Burnet* v. *Jergin Trust Co.*, 288 U. S. 508 (1932).

(7) A federal license tax upon state-owned liquor stores. *Ohio* v. *Helvering*, 292 U. S. 360 (1934).

(8) A federal tax upon compensation of a member of the Board of Trustees of Boston Elevated Railway. *Helvering* v. *Powers*, 293 U. S. 214 (1934).

(9) A federal tax upon the lessee's income derived from oil produced by state school lands. *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938).

(10) A federal tax upon the salary of an employee of the Port of New York Authority. *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938).

(11) A federal tax upon admissions to athletic contests conducted by a state university. *Allen* v. *Regents*, 304 U. S. 439 (1938).

This list is probably incomplete, but at least is representative.

During the 1930's the crop of adjudication arising from the immunity doctrine became so luxuriantly uncontrolled that nearly all of it was disapproved in 1938-1939.

Since the decision of *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466 (1939), which expressly overruled the doctrine of constitutional immunity from *indirect* burdens, most notably the burden previously assumed to exist by reason of a tax upon a salary of a governmental employee or officer, or upon one contracting with government to supply it with goods or perform services for it, the nineteen cases listed, which already were fighting amongst themselves, have with three exceptions been overwhelmed. None of the eight cases first listed, wherein the decision was against the federal tax, involved such a tax imposed directly upon the property or activity of a state. All were upon persons acting under state law, or employees of a state, or persons

doing business with it. So also with all cases in the second list, except *South Carolina* v. *United States*, and *Ohio* v. *Helvering* (the federal license taxes imposed upon state-operated liquor stores), and *Allen* v. *Regents*, (the federal tax upon admissions to athletic contests conducted by a state university).

This is not supposed to mean that there remains no doctrine of immunity of state property and activities from federal taxation. On the contrary, the majority opinion by Mr. Justice Stone in the *O'Keefe* case continued to talk of "the constitutional immunity of *either* government from taxation by the other" (306 U. S. p. 480, emphasis added), and said of the *Gerhardt* case that it was properly held that the salaries of the employees of the Authority were not immune, "even though the Authority be regarded as not subject to federal taxation" (p. 484). There was discussion of possible differences between state immunity and federal immunity (p. 485); the basis for overruling *Collector* v. *Day* and similar decisions was said to be the unwarranted assumption that the tax burden placed upon another actually burdened the government by which he was employed or with which he dealt (pp. 483, 486), and that case was overruled only to the extent made appropriate by that consideration (pp. 486-487). In the concurring opinion of Mr. Justice Frankfurter, also, it was only the "sterile refinements" (p. 488) and the "interdependent doctrine" (p. 492) which were condemned; the reason and force of the underlying doctrine was stated as follows:

> "Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations." (p. 488.)

Likewise in *Mayo* v. *United States*, 319 U. S. 441, 447 (1943) Mr. Justice Reed said of the freedom of a federal activity from state taxation:

> "This freedom is inherent in sovereignty."

And in *United States* v. *County of Alleghany*, on May 1, 1944, Mr. Justice Jackson said:

> "The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity but without impairing the immunity of the State or the Nation itself."

There remains, then, a doctrine of immunity of state property and activities from federal taxation, its essential vigor unimpaired, but its application very uncertainly defined.

In the more recent decisions on tax immunity the favored test has been that of "*direct burden.*" Thus, in *Mayo* v. *United States* it was said that the objectionable inspection fees "are laid *directly* upon the United States." (319 U. S. at p. 447, italics added). In the *County of Alleghany* case all three opinions acknowledged the test, although Mr. Justice Roberts was of opinion that it was not being followed. The brief for the United States in *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941) disclaimed all tests for immunity except whether the tax was nondiscriminatory and whether it was imposed upon the government or a private person. The opinion by the Chief Justice approved the test selected, and disagreed with the attorneys for the United States as to the incidence of the tax. The *O'Keefe* and *Gerhardt* cases certainly hold that income tax imposed upon salaries of employees is not a "direct burden" upon the employing government. The following statement from the *O'Keefe* opinion speaks for both:

> "The burden on government of a non-discriminatory income tax applied to the salary of the employee of a

government or its instrumentality is the same, whether a state or national government is concerned." (3066 U. S. at p. 485.)

Oddly enough, in the present case the United States did not rely upon the "direct burden" test, but upon the "governmental function" test, for which it cited the *Gerhardt* case. See the comment of the District Court that the plaintiff, "finds particular comfort, if not the whole support for its position," in that case and three earlier ones (R. 37). The same cases are considered in the opinion of the Circuit Court of Appeals, leading to this statement:

> "We think the fundamental consideration must be that exemption from federal taxation in a particular case flows from the necessity to protect the continued existence of a state. Cf. *Helvering* v. *Gerhardt*, 304 U. S. 405, 421. The need of the state activity to maintain the states as they exist in our system of dual sovereignty will loom as the paramount issue, and whether any activity is described as essential or usual or traditional or something else will not weigh very heavily except as it bears upon that."

A warning against all such tests is found in the majority opinion in *Brush* v. *Commissioner*, 300 U. S. 352, 361-364 (1937), and the double test of non-discrimination and direct burden is outlined in the dissent of Mr. Justice Roberts (p. 375). Mr. Justice Black has also criticized the test of "essential government functions" in his concurring opinion in the *Gerhardt* case, 304 U. S. at pp. 426-427. The doctrine that all activities of the federal government, including the bank involved in *McCulloch* v. *Maryland* and many more recent and novel businesses, are necessarily governmental, but identical activities of a state are proprietary, lacks a sense of reality. As Mr. Justice Black said, it is the people acting through Congress and the state legislatures who determine, as conditions demand, what services and functions the public welfare demands (304 U. S. p. 427).

Although the majority opinion in the *Gerhardt* case contained a lengthy discussion of the "nature" of the state activity involved—the Port of New York—it does not really support that test. Illustrative of its indefinite basis, is this caveat contained in the opinion:

> "Expressing no opinion whether a federal tax may be imposed upon the Port Authority itself with respect to its receipt of income or other activities, we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any functions essential to the continued existence of the State government." (p. 424.)

But when the *O'Keefe* case was decided ten months later, and the *Gerhardt* case was discussed in its opinion, there was no longer talk of the "nature" of the activities involved, but only of the incidence of the tax. See 306 U. S. p. 484.

The reason why the United States did not rely upon the "direct burden" test in the present case, although it asserted its superiority in the recent cases of *Mayo* and *King & Boozer*, is to be found in the nature of the present case.

If, as here, a tax is levied directly upon money in the hands of the State derived from its sale of its natural resources, little question remains about the incidence of the tax.

Petitioners submit that it is the essence of sovereignty for a state to be able to dispose of its property. Possessed of much property, whether originally owned or acquired with time, the states as a traditional, usual and necessary practice have owned and disposed of this property. Land, water, oil, coal, gold, gravel in river beds, are but a few of the natural resources that the states have sold. Public welfare is subserved by making the resources of the state available for enjoyment by the people, and the proceeds

from the sale of such property are revenue to carry on other governmental functions. If the states and federal government were to tax each other because of the ownership and sale of their respective natural resources, the burden upon government itself would be apparent.

Hence, it is not surprising that the Courts have without question considered this governmental activity as one removed from the taxing power of the other sovereign. Thus, in *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279 (1930), where the Court sustained a federal tax upon profits derived by a lessee from the sale of oil and gas produced on lands leased by the State of Texas, the Court said (p. 282):

> "Property sold or otherwise disposed of by the government, either state or national, in order to raise revenue for government purposes, is in a broad sense a government instrumentality, with respect to which neither the property itself before sale, nor its sale by one government, may be taxed by the other."

More recently the Court reexamined the question of taxing the gains of lessees of state or federal lands in *Helvering* v. *Mountain Producers' Corporation*, 303 U. S. 376 (1938). The Court recognized the distinction between a tax upon the state and a tax upon the lessee when it framed the issue before it thus (p. 384):

> "whether, in a case where a tax is not laid upon the the *leases* as such, or upon the *government's property* or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income." (Emphasis supplied.)

Petitioners do not suppose that it is contended that the federal government may tax the income the states realize from leases of lands containing saleable natural resources. Is the state to be burdened because as a matter of state

policy it is thought more desirable to dispose of these resources as a continuous state activity? Or conversely, if the federal government chose to produce and sell the oil on Indian lands, could the State tax the sale thereof or income produced thereby?

The case at bar presents such a situation. Involved here is a federal tax upon the sale by the State of its natural resources. The incidence of the tax is directly upon the State. Without reviewing all of the facts contained in the statement, petitioners point out that the sale of these natural waters by the petitioners is not an isolated activity, but merely a small part of a larger program of conservation of natural resources, promotion of health and creation of recreation facilities.

The distinction, therefore, between the case at bar and the cases cited by the District Court and the Circuit Court of Appeals is readily apparent. In *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214, and *Allen* v. *Regents*, 304 U. S. 439, the respective state was not engaged in the disposition of its natural resources. In the *South Carolina* and *Ohio* cases, the states bought and sold liquor; in the *Powers* case the state merely took over the management of an existing railway; in the *Regents* case the state constructed two stadia seating about 30,000 people each for universities whose student bodies were about 2,000 each, and sold admissions (304 U. S. p. 450). Anybody seeking an analogy to those facts will find one, not in the disposition of the spring waters at Saratoga, but in the summer theatre, the swimming pool, the golf course, or the hotel constructed on the Reservation, if all these activities were operated by the Commission.

It was urged by the United States herein that the absence of profits or the fact that profits from the sale of waters

are used to defray the expenses of the Reservation will not immunize the sales. Petitioners similarly contend that the fact that profits *are* realized from the sales does *not* deprive them of their immunity. As the Court said in *Brush* v. *Commissioner,* 300 U. S. 352, 372-373 (1936):

> "If that service be governmental it does not become private because a charge is made for it, or a profit realized. A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it (see *Bingham* v. *Golden Eagle Lines,* 297 U. S. 626, 628); but this does not destroy the claim that the maintenance of the highway is a public and governmental function. The state or the city may exact a tuition charge for instruction in the public schools; but thereby the maintenance of the public schools does not cease to be a function of the government. The state exacts a fee for issuing a license or granting a permit; for recording a deed; for rendering a variety of services in the judicial department. Do these various services thereby lose their character as governmental functions? The federal Post Office Department charges for its services; but no one would question the fact that its operation calls into exercise a governmental function."

Petitioners here point out that in the *South Carolina* case, the source of all adverse authorities, one of the most powerful considerations was the Court's fear that if the liquor business were free from federal taxation, the State might enter other businesses and thus destroy a large source of federal revenue. That consideration is certainly not present in the case at bar. If this Court should hold that the State may sell its natural mineral waters free from federal tax, there is no need to fear that the State may exercise its police powers in other fields of activity and thus limit the sources of federal revenue. The number of natural resources is not large and, thus, the list of immune activities rather limited. Furthermore, with respect to the particular facts of the case at bar, it is to be noticed that

the State did not acquire the springs at Saratoga to bottle and sell the waters. In fact, although the first legislation creating the board known as "The Commissioners of the State Reservation at Saratoga Springs" gave it the power to sell the excess of mineral water not used on the premises (L. 1909, ch. 569, Sec. 5), it was not until 1930 that the successors of this original board exercised that power.

Again, it is to be noticed that on the facts of the case at bar the sale of these natural waters is not an isolated activity, but is related to a particular program of conservation, health, and recreation. Petitioners recognize that the Court, in *Allen* v. *Regents*, was not persuaded to exempt football tickets from a federal tax because the proceeds of the exhibition were used to finance the State educational program. But the tax in that case was not against the State which was merely the collecting agency for the tax which was payable by the purchaser of the ticket and not as here by the State itself. Mention is made of the larger program at Saratoga Springs, however, because it is only in connection with that program that the State decided to sell these waters. Thus, to grant immunity in the case at bar does not necessarily require immunity when the State engages in a wholesale disposition of its natural resources, unrelated to any particular public program.

Petitioners see no reason why the taxing power of the federal government will be seriously impaired if the sale of Saratoga mineral waters is free from tax. On the other hand, to hold this activity within the scope of the federal taxing power might seriously hamper the operation of the program of conservation, health and recreation at the Spa.

Conclusion.

For the three reasons stated at pages 6-7 of this petition and brief, supported by the discussion of relevant decisions

contained herein, it is respectfully submitted that the petition for a writ of certiorari in the instant case should be granted.

Albany, May 4, 1944.

NATHANIEL L. GOLDSTEIN,
Attorney General of the
State of New York,
Attorney for Petitioners.

ORRIN G. JUDD,
Solicitor General,
WENDELL P. BROWN,
First Assistant Attorney General,
HENRY S. MANLEY,
Assistant Attorney General,
of Counsel.

DENIS J. HARRINGTON,
Of Counsel for
Saratoga Springs Commission
and Saratoga Springs Authority.